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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES, INC.,

Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION 23, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 1

ISSUE PRESENTED 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PRE-EMPTION DOES NOT ARISE IN CASES WHERE A UNION ENGAGES IN UNLAWFUL TRESPASSORY INFORMATIONAL PICKETING AND FILES AN UNFAIR LABOR PRACTICE CHARGE ONLY AFTER AN EMPLOYER BRINGS SUIT IN STATE COURT TO ENJOIN THE UNLAWFUL ACTIVITY. STATE COURTS RETAIN JURISDICTION BECAUSE SUCH ACTIVITY IS "DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY" AND THERE IS LITTLE LIKELIHOOD OF INTERFERENCE WITH NATIONAL LABOR POLICY 5

A. UNLAWFUL TRESPASSORY PICKETING IS AN OFFENSE WHICH FALLS SQUARELY WITHIN THE EXCEPTION TO PREEMPTION FOR CONDUCT THAT TOUCHES LOCAL FEELING AND RESPONSIBILITY 12

B. PRE-EMPTION SHOULD NOT BE APPLIED SIMPLY BECAUSE OF THE FILING OF A UNFAIR LABOR PRACTICE WITH THE BOARD 15

II. THE COURT SHOULD INTERPRET THE NLRA TO AVOID ANY INFRINGEMENT OF AN EMPLOYER'S FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES 16

III. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO FINALLY RESOLVE THE QUESTION OF PRE-EMPTION THAT WAS LEFT OPEN IN *SEARS*, WHICH HAS LED TO A SIGNIFICANT SPLIT OF OPINION IN THE STATE COURTS THAT HAVE ADDRESSED THE QUESTION. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THE MATTER IN ABEYANCE, PENDING THE RESOLUTION OF *LECHMERE v. NLRB*, No. 90-970, WHICH IS CURRENTLY PENDING BEFORE THE COURT 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Page

Automobile Workers v. Russell,
356 U.S. 634 (1958) 12, 16

Belknap v. Hale,
463 U.S. 491 (1983) 6

Bill Johnsons Restaurants, Inc. v. NLRB,
461 U.S. 731 (1983) ..... *passim*

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 16

Central Hardware Co. v. NLRB,
407 U.S. 539 (1972) 12, 13

Construction Workers v. Laburnum Construction Corp.,
347 U.S. 656 (1954) 12, 16

Cross Country Inn, Inc. v. South Central District Council, Carpenters,
Ohio App. 3d 8, 552 N.E.2d 232 (1989) 7

Farmer v. Carpenters,
430 U.S. 290 (1977) 12, 16

Francis W. Hoeber v. Local 30, United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Assn.,
1991 U.S. App. LEXIS 16731
(3d Cir. July 30, 1991) 10

Golden State Transit Corp. v. City of Los Angeles,
110 S. Ct. 444 (1989) 6, 8

TABLE OF AUTHORITIES - CONTINUED

Page

Green v. Biddle,
U.S. 1 (1823) 8

Hanna Mining Co. v. Marine Engineers,
382 U.S. 181 (1966) 14

International Longshoremens Local 1416 v. Ariadne Shipping Co.,
397 U.S. 195 (1970) 18

Jean County,
291 N.L.R.B. No. 8 (1988) 8

Linn v. Plant Guard Workers,
383 U.S. 53 (1966) 12

Longshoremen v. Davis,
476 U.S. 380 (1986) 6

Machinists v. Wisconsin Employment Relations Comm.,
427 U.S. 132 (1972) 8

May Department Stores Co. v. Teamsters,
Ill. 2d 153, 355 N.E.2d 7 (1976) 7

McDonald v. Smith,
472 U.S. 479, 482 (1985) 16

NLRB v. Babcock & Wilcox,
351 U.S. 105 (1956) 11-13, 17

San Diego Bldg. Trades Council v. Garmon,
353 U.S. 26 (1957) ..... *passim*

TABLE OF AUTHORITIES - CONTINUED

Page

Scott Hudgens v. NLRB,
424 U.S. 507 (1976) 7

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,
436 U.S. 180 (1978) ..... *passim*

Shirley v. Retail Store Employees Union,
225 Kan. 470, 592 P.2d 433 (1979) 7

Smitty's Super Markets, Inc. v. Store Employees Local 322,
637 S.W.2d 148 (Mo. App. 1982) 7

Truax v. Corrigan,
257 U.S. 312 (1921) 8

UFCW Local 400 v. Marval Decertification Comm.,
708 F. Supp. 761 (W.D. Va. 1989) 11

Vaca v. Sipes,
386 U.S. 171 (1967) 8

Weis Markets, Inc. v. United Food and Commercial Workers, Local 400,
Md. App. 284, 583 A.2d 1092 (1991) 7

Wiggins & Co., Inc. v. Retail Clerks Union Local No. 1557, 595,
S.W.2d 802 (Tenn. 1980) 7

TABLE OF AUTHORITIES - CONTINUED

Page

STATUTES

National Labor Relations Act,
29 U.S.C. § 158(a)(1) 4

MISCELLANEOUS

Gould, *Union Organizational Rights and the Concept of Quasi-Public Property*,
49 Minn. L. Rev. 505, 507-08 (1965) 8

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BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Center on National Labor Policy, Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. Briefs amicus curiae have been filed by the Center advocating the validity of this public policy interest in other cases before the Court, including, *Lehnert v. Ferris Faculty Assn., No. 89-1217; Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Con-*

struction Trades Council, No. 80-1257; *and New York Telephone Co. v. N.Y.S. Dept. of Labor*, No. 77-961.

The parties to the instant case are primarily focusing on the important constitutional and judicial review aspects under the National Labor Relations Act. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Supreme Court of Appeals of West Virginia — that enumerated public policy interests will cause a divergence in the application of the state trespass litigation-resolving-analysis imposed by this Court previously in cases involving the National Labor Relations Board under the National Labor Relations Act ("NLRA").

A continuing subject of concern for the Center is the failure of national labor policy to make a reasonable accommodation of the rights and needs of small businessmen. While there is a popular misconception of labor-management relations as consisting of a struggle between workers and the large corporations that employ them, the majority of workers in the United States are employed by small businesses and have a close personal relationship with their employer. However, the misconception has resulted in a balancing of the interests of million member unions and multi-million dollar enterprises with little regard being given to the interests of the general public and small businesses.

In the context of this case, small businesses simply cannot survive a three year wait for the National Labor Relations Board to make a decision.[1] A national labor policy that would remove

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[1]On several occasions, the Center has represented the owners of small businesses in matters subject to the NLRA. That representation has occurred in several fora, including this Court. One of those cases, *Gasaway v. Laborers Pension Fund*, 793 F.2d 1296 (7th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), is particularly illustrative of the problems that can arise from the imbalance of power between small businesses and huge unions. Mr. Gasaway was the twenty year old owner of a small paving company, on his first commercial job, when representatives of locals of the Laborers, the Teamsters, the Operating Engineers, the Carpenters and the Electricians unions demanded that he sign their contracts and pay union dues in order to continue working on the project.

jurisdiction from the only forum that can provide an effective remedy for illegal trespassory activity - state court - is a consequence almost certainly not condoned under the NLRA (the instant issue). This outcome would be seriously flawed and contrary to what Congress must have intended.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

ISSUE PRESENTED

Whether the mere filing of a charge against an employer with the General Counsel of the National Labor Relations Board ("the Board" or "NLRB") preempts the employer's state court trespass action against a union's trespassory informational picketing and handbilling, thereby leaving the employer, pending the exhaustion of NLRB procedures, with no federal or state forum in which to vindicate its property rights.

SUMMARY OF ARGUMENT

The Court has established, in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U. S. 180 (1978), that the tort of trespass is included in the category of activities that are so strongly linked to "local feeling and responsibility," that pre-emption will not apply. However, in *Sears*, the Court specifically left open the question whether state court jurisdiction would be ousted if a union filed an unfair labor practice charge after being asked to leave the employer's premises. That issue was sharply contested in concurring opinions that were issued by Justices Blackmun and Powell, with Justice Blackmun insisting that pre-emption would arise immediately upon the filing of a ULP and Justice Powell responding that such an approach would create a "jurisdictional no-man's land" which could not have been intended by Congress.

The state courts that have addressed the question subsequent to *Sears* have split dramatically. Thus leading to the incongruous result of the pre-emption doctrine, which is intended to support uniformity of national labor policy, creating substantial differences in the rights available to an employer based solely on the location of his property.

The application of the principles established in the Court's pre-emption cases leads to the conclusion that state courts have jurisdiction to hear a suit based on a violation of state trespass laws. The inquiry must include a balancing of the strength of the rights asserted by the employer and the union and consideration of the likelihood of interference with a national labor policy.

An inquiry into the likelihood of interference with national labor policy reveals that it is extremely unlikely that a problem would arise. First, as the Court has noted, the union area-standards activity in question is almost never protected under the NLRA and, therefore, whatever a state court does will not impact the federal labor law at all. Secondly, *Sears* established that state courts are permitted to resolve trespass disputes where no ULP is filed: they are already making decisions in the area. Finally, as the split in the state courts demonstrates, some states are currently hearing trespass actions even after a ULP is filed. There has been no showing of harm arising from their retention of jurisdiction.

The Court should be careful to avoid an interpretation of the Act that would infringe important constitutional rights. Consideration of this right led the Court to severely limit the Board's ability to interfere with a state court action in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

The Court's decisions in *Sears* and *Bill Johnson's Restaurants* combine to establish an orderly system that commits the resolution of tortious disputes to state courts. This system avoids the possibility of a "jurisdictional no-man's land" arising and places responsibility on the only forum that is able to provide complete relief in a timely manner. Only a writ of *certiorari* granted at this juncture in the development of federal labor law will ensure that this prospect does not occur.

ARGUMENT

I. PRE-EMPTION DOES NOT ARISE IN CASES WHERE A UNION ENGAGES IN UNLAWFUL TRESPASSORY INFORMATIONAL PICKETING AND FILES AN UNFAIR LABOR PRACTICE CHARGE ONLY AFTER AN EMPLOYER BRINGS SUIT IN STATE COURT TO ENJOIN THE UNLAWFUL ACTIVITY. STATE COURTS RETAIN JURISDICTION BECAUSE SUCH ACTIVITY IS "DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY" AND THERE IS LITTLE LIKELIHOOD OF INTERFERENCE WITH NATIONAL LABOR POLICY.

The essence of the pre-emption doctrine is that state courts do not have jurisdiction to address the legality of activity that is arguably within the protection or the prohibition of §§ 7 or 8 of the NLRA, 29 U.S.C. §§ 157, 158. However, in *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957), this Court evaluated its previous decisions and Congressional intent and established that pre-emption does not preclude a state from providing a civil remedy for tortious conduct that arises in the context of a labor dispute.

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U. S. 180 (1978), the Court applied the principles of *Garmon* and determined that state courts have jurisdiction to address the legality of trespassory aspects of a union's picketing when an employer who has no way to invoke the jurisdiction of the National Labor Relations Board ("the Board" or "NLRB") files a lawsuit under state law. Because the union involved in *Sears* had not filed an unfair labor practice charge ("ULP"), the Court left open the question whether the filing of a ULP subsequent to the filing of the state suit would serve to pre-empt state jurisdiction.

However, in separate concurring opinions, Justices Blackmun and Powell addressed that question and reached opposite conclusions. Justice Blackmun concluded that "if a union timely files a

§ 8(a)(1) charge,[2] a state court would be bound to stay any pending injunctive or damages suit brought by the employer until the Board has concluded, or the General Counsel by refusal to issue a complaint has indicated, that the picketing is not protected by § 7." *Id.* at 209.

Justice Powell disagreed, primarily out of concern that the pre-emption of state jurisdiction would result in a "no-man's land" of jurisdiction during which no state or federal forum would be able to provide relief from an illegal trespass. Justice Powell suggested that "it may take weeks for the General Counsel to decide whether to issue a complaint," during which time, neither the Board nor the state courts would have jurisdiction to afford relief to the employer. Justice Powell concluded that he was "unwilling to believe that Congress intended, by its silence in the Act, to create a situation where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation." Id., at 213.

More recently, in *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 451 n.7 (1989), the Court appears to have further refined its analysis of the pre-emption issue. There the Court concluded that the pre-emption doctrine rests upon a primary jurisdiction analysis in circumstances where the "injured" party has an effective right of redress before the Board. Citing to three cases, *Sears*, 436 U.S. at 193-98, *Belknap v. Hale*, 463 U.S. 491, 510 (1983), and *Longshoremen v. Davis*, 476 U.S. 380, 393 N.10 (1986), the Court explained:

> *Garmon* pre-emption divests a state court of jurisdiction over actions where the state law prohibits the same conduct that is arguably prohibited by the NLRA,..., and actions involving conduct arguably protected under the NLRA *provided the injured party has a means of bringing the dispute before the Board.*

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[2]Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), makes it an "unfair labor practice for an employer-(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

(Emphasis added).

State courts that have addressed the question subsequent to *Sears* have split in their resolution of it. Courts that have determined that pre-emption arises, in addition to the instant case, include *Shirley v. Retail Store Employees Union*, 225 Kan. 470, 592 P. 2d 433 (1979); *Cross Country Inn, Inc. v. South Central District Council, Carpenters*, 50 Ohio App. 3d 8, 552 N.E. 2d 232 (1989); and *Wiggins & Co., Inc. v. Retail Clerks Union Local No. 1557*, 595 S.W. 2d 802 (Tenn. 1980). Courts reaching an opposite conclusion include *Weis Markets, Inc. v. United Food and Commercial Workers*, Local 400, 85 Md. App. 284, 583 A. 2d 1092 (1991); and *Smitty's Super Markets, Inc. v. Retail store Employees Local 322*, 637 S.W. 2d 148 (Mo. App. 1982). Also, see *May Department Stores Co. v. Teamsters*, 64 Ill. 2d 153, 355 N.E. 2d 7 (1976), cited by Justice Powell in his concurrence.

Amicus believes that the courts that have held that pre-emption arises under these facts have misconstrued this Court's decisions on pre-emption. This Court has steadfastly "refused to apply the Garmon guidelines in a literal, mechanical fashion," *Sears*, 436 U. S., at 188, but, rather, "the Court has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), citing *Garmon*, 359 U.S. at 244. In short, the Court has taken care to preserve for states the right to maintain domestic peace through the administration of its judicial system. This is the essence of the Court's allowance of concurrent jurisdiction in *Sears*, 436 U.S. at 199.

As Justice Neely in his dissenting opinion in the court below explained, where a jurisdictional no-man's land exists, it becomes likely that the only manner for a property owner to its protect ostensible state property rights would be to use the "ungood" methods of self-help (in labor law parlance) which inevitably leads to rapid escalation of "ungood" acts, violence and the assured destruction of both party's rights, including the public's right to peace and safety. Pet. App. B-20. As the Court further interpreted in *Golden State Transit Corp.*, 110 S. Ct. at 451-52, it was the express view of Congress to compel an orderly resolution

of grievances, but not to allow preemption where resort to the federal statutory scheme would be contrary to that goal:

> The *Machinists* [*v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1972)] rule is not designed-as is the *Garmon* rule-to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies sovereign authority to abridge a personal liberty....the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another. (Citations omitted)"[3]

The Court's decisions in *Sears* and *Bill Johnson's Restaurants* establish the procedures that an employer should follow in response to illegal picketing and place limits on the Board's ability to interfere with the state court proceedings that the Court recommends. In *Sears*, 436 U.S. at 202, the Court concluded that employers have three options when confronted by an illegal

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[3]National Labor Relations Board jurisprudence has always considered the real property right in a *de minimis* manner. *See e.g. Jean Country*, 291 N.L.R.B. No. 4 (1988). Yet, a business employer's ownership of property includes the right to control, protect, and defend the boundaries of its possession. *Green v. Biddle*, 21 U.S. 1 (1823) (trespass quare clausum fregit). Its business is itself a property right. *Truax v. Corrigan*, 257 U.S. 312, 327 (1921).

In the present case, the employer's property interest includes the exclusive use of his property to return an economic profit. Notably, the Board's calculus has never considered the financial cost to the property owner by commanding union access. Neither does it consider the confusion caused to the customers who were cultivated by the employer through the expenditure of considerable advertising money. This "volatile influence on certain audiences" of picketing, is the tangible fact that it "involves customers' annoyance and a consequent loss of sales for management," Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505, 507-08 (1965), and other expenses, *e.g.*, security, littering, maintenance, accident liability, and added insurance costs.

trespass and advised employers on how to respond to their choices. First, they have no obligation to permit the trespass to continue. However, the Court also discouraged resort to self-help measures to terminate the trespass. In the Court's view, this left "proceeding in state court" as the only means for an employer to"obtain an orderly resolution of the question whether the union had an federal right to remain on its property.

Having explained where the employer should go to seek redress of a civil grievance, in *Bill Johnson's Restaurants* the Court then explained that the NLRB is not entitled to interfere with the employer's choice.

In Bill Johnson's Restaurant's, several employees exercised their right to engage in organizational activity that was protected by the NLRA.[4] One of the defendants filed a charge with the NLRB, alleging that the lawsuit had been filed in retaliation against the defendants because they had engaged in protected activities and claiming that the filing of the suit therefore constituted a ULP. The General Counsel issued a complaint and, after a hearing by an administrative law judge, the Board issued an order that required that the employer withdraw his state court lawsuit and pay the defendants for all their legal expenses incurred in connection with the lawsuit. The Court of Appeals enforced the Board's order in its entirety.

On *certiorari*, this Court held that "the Board may not normally halt the prosecution of a state court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of a reasonable basis

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[4]The employer threatened to "get even" with them "if it's the last thing I do." Subsequently, the employer filed a civil lawsuit which included allegations that the defendants had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant and created a threat to the public safety. The suit also included a claim of libel.

are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." 461 U.S. at 748-749.[5]

The Court based its holding on the combined "weighty countervailing considerations" of the employer's First Amendment right of access to the courts to petition the government for the redress of grievances and on the state's interest in maintaining order. The Court also clearly stated that the prevention of continuing trespass is one of the areas in which a state court's jurisdiction may not be ousted:

> In recognition of the States compelling interest in the maintenance of domestic peace, the Court has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests "deeply rooted in local feeling and responsibility." [*Garmon*]. It has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute. *See, e.g., Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978).

Bill Johnson's Restaurants, 461 U.S. at 741-742.

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[5]In *Francis W. Hoeber v. Local 30, United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Assn.*, 1991 U.S. App. LEXIS 16731 (3d Cir. July 30, 1991), the court affirmed a denial of a § 10(l) injunction requested by the Board to stop an independent lawsuit while the Board was considering an unfair labor practice complaint. The district court affirmed the denial of relief to the Board for this purpose for three reasons. "First, the Congressional purpose behind the enactment of § 10(l) was not to enjoin legal action, but was rather to enjoin clear obstacles and impediments to business, such as strikes, pickets, and boycotts." *Id.* at 11. Second, the lawsuit "did not create the degree of harm necessary to justify an injunction. Moreover, the Supreme Court has required restraint on the part of federal courts in enjoining lawsuits. The filing of a lawsuit carries significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts." *Id.* at 12-13.

The framework thus established by the Court provides an orderly system for maintaining the public peace and removes the possibility of a "jurisdictional no-man's land." Once a state court has taken jurisdiction of a state law tort claim the Board has no authority to oust its jurisdiction. However, the Board may clearly intervene in the judicial action to protect its jurisdiction and urge dismissal of relevant counts that intrude on its exclusive jurisdiction. This it does when it percieves the need to be great. *See UFCW Local 400 v. Marval Decertification Comm, 708 F. Supp. 761 (W.D. Va. 1989)* (Board intervened urging federal court dismissal of § 301 Count, deferral to the Board on a § 302 Count, and abeyance pending Board ruling on a third RICO Count, where union filed lawsuit against workers for seeking to decertify the union). This system commits the maintenance of order to the forum that is familiar with the relevant law, and that is equipped to provide full relief in a timely manner.

An additional factor that supports the conclusion that states are not pre-empted from retaining jurisdiction in an action against trespass is the balance between the strong right to the use of real property and the relatively weak § 7 rights that are being asserted in informational picketing and handbilling. The Court has consistently supported the retention of property rights in cases such as *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956). In contrast, the Court noted in *Sears* that informational picketing "would be unprotected in most instances." 436 U.S. at 206. Recognition of that fact strengthens the conclusion that pre-emption is inappropriate since there is a lesser likelihood of interference with national labor policy.

Due to the exceptional disparity in the state court's and the federal court's on this issue, a writ of *certiorari* should be granted to resolve this important judicial conflict with the decisions of this Court.

A. UNLAWFUL TRESPASSORY PICKETING IS AN OFFENSE WHICH FALLS SQUARELY WITHIN THE EXCEPTION TO PREEMPTION FOR CONDUCT THAT TOUCHES LOCAL FEELING AND RESPONSIBILITY

The right of a state to uphold its civil laws over labor related tortious conduct has been recognized in numerous cases, including *Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (violence); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (obstruction of access to property); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (libel); and *Farmer v. Carpenters*, 430 U.S. 290 (1977) (intentional infliction of emotional distress). The court below failed to recognize the overriding importance of state jurisdiction to the scheme of orderly resolution of matters comprising federal labor law.

In *Sears*, 436 U.S., at 188-189, the Court reiterated the test that was previously set forth in *Vaca v. Sipes*, 386 U.S. 171, 180 (1967): "the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies."

In instances of trespass for the purpose of informational picketing and handbilling, the interests that must be balanced are the employer's right to the enjoyment of his personal property and the union's right to communicate with the public. The Court has always recognized that the employer's property right is extremely strong.

In a series of cases beginning with *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), the Court has repeatedly rejected Board approval of union trespasses. In *Babcock*, the Court upheld the employer's property right over non-employee organizers where the employer had a nondiscriminatory no solicitation policy. In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court rejected the Board's contention that because an employer permits the public to come onto his property, he forfeits his right to prohibit solicitation by non-employee organiz-

ers. Finally, in *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court refused to permit even the employees of an affiliated company to trespass to engage in "economic strike activity." From these cases, it is clear that an employer's interest in preventing a trespass on his property enjoys a high degree of deference.

In contrast, the right to conduct informational picketing is a lesser right. As the Court observed in *Sears*, 436 U.S. at 206, n. 42, "the right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a § 7 right." The Court further noted that "[a]rea standards picketing. . . has no such vital link to the employees located on the employers property." *Id.*

Furthermore, the question whether trespassory picketing is a protected right was explained by the Court in *Sears*, 436 U.S. at 205 (emphasis added), in light of *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware*, to uphold state jurisdiction because of the most unlikely possibility that such trespass would be protected:

> the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a *heavy one* is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has *rarely been in favor of trespassory organizational activity.*

Thus, it is clear from the Court's decisions that an employer's property rights would take precedence over a union's right to invade its property for the less connected activity of informational picketing. The West Virginia Supreme Court of Appeals failed to properly consider this jurisprudence in its decision that the state's jurisdiction was totally pre-empted.

There remains to consider, however, whether the application of state trespass law to informational picketing threatens to interfere with national labor policy. In considering this question, reference must be made to the guidelines found in *Sears*, 436 U.S., at 188, n. 13:

> Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the *Garmon* rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 86 S. Ct. 327, 15 L.Ed. 2d 254. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to "compelling precedent applied to essentially undisputed facts," *San Diego Building Trades Council v. Garmon*, 359 U.S., at 246, 79 S. Ct., at 780, the court may properly do so and proceed to adjudicate the state cause of action.

There is little likelihood that the application of state law to trespassory informational picketing would interfere with national labor policy. First, since *Sears*, state law on trespass has been applied in instances where no ULP is filed. Second, as the Court noted in *Sears*, 436 U.S., at 206, such picketing "would be unprotected in most instances." Third, as the split on this question among the states indicates, some states are currently exercising jurisdiction even after the filing of a ULP, with no apparent disruption of national labor policy.

Thus, under the criteria established by the Court, pre-emption should not be applied under the facts of this case. *Certiorari* should be granted to settle this issue among the several states.

B. PRE-EMPTION SHOULD NOT BE APPLIED SIMPLY BECAUSE OF THE FILING OF A UNFAIR LABOR PRACTICE WITH THE BOARD

The balance of factors that was set in Sears should not be disturbed simply because of the filing of a ULP. The mere filing of a ULP offers no evidence of wrong-doing: the charge may be utterly frivolous. However, even on a frivolous charge a determination may not be made by the General Counsel or the Board for an extended period of time. In the instant case, the General Counsel took 13 months to issue a complaint after the filing of the ULP. When the complaint was issued, it included an allegation that Riesbeck's maintenance of the trespass action in state court constituted an unfair labor practice - despite this Court's declaration that the filing of such a suit is *the* appropriate course of action to pursue when an employer is confronted by trespassory informational picketing! [6] *See* Petition for Writ of Certiorari, p. 5.

In the alternative perspective, the General Counsel may not issue a complaint at all, leaving open the question whether the union activity was in fact protected under federal labor law, because the refusal to issue a complaint is not a Board ruling. In these circumstances the jurisdictional vacuum left open by the West Virginia Court's interpretation of the preemption doctrine,

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[6] "In the face of the Union's intransigence, Sears had only three options: permit the pickets to remain on its property; forcefully evict the pickets; or seek the protection of the State's trespass laws. Since the Union's conduct violated state law, Sears legitimately rejected the first option. Since the second option involved a risk of violence, *Sears surely had the right* -- perhaps even the duty -- to reject it. *Only by proceeding in state court*, therefore, could Sears obtain an orderly resolution of the question *whether the Union had a federal right to remain on its property.*"

Sears, 436 U.S. at 202 (emphasis added). *Also see Bill Johnson's Restaurants*, 461 U.S. at 741-742.

leaves neither the union nor the employer with an avenue to seek redress or consideration of its rights.[7]

Several of the Court's pre-emption cases address situations that could be the subject of a ULP, including *Farmer*, *Russell* and *Laburnum*. It would be no more appropriate to remove state court jurisdiction here than in those other instances.

II. THE COURT SHOULD INTERPRET THE NLRA TO AVOID ANY INFRINGEMENT OF AN EMPLOYER'S FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court recognized that the First Amendment guarantee of a right to petition the government for a redress of grievances includes the right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." *Also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment...."). That principle was applied to the NLRA in *Bill Johnson's Resytaurants*, 461 U.S. at 741-742. There the Court rejected an attempt by the NLRB to enjoin the prosecution in state court of a civil action which had been filed in retaliation for activity that was protected under the NLRA. In rebuffing the Board, the Court declared that "[w]e should be sensitive to these First Amendment values in construing the NLRA in the present context." Id.

The instant case presents similar concerns. As Justice Powell noted in his concurring opinion in *Sears*, the removal from state

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[7]As the Court noted in *Sears*, 436 U.S. at 198 n.28, if an employer were to file a charge, it would be likely that the Board might conclude "that the picketing was not prohibited, Sears would still be confronted with picketing which violated state law and was arguably protected by federal law. Thus, the filing of an unfair labor practice charge could initiate complex litigation which would not necessarily lead to a resolution of the problem which led to this litigation."

courts of jurisdiction to adjudicate claims of illegal trespass will be likely to result in a denial of access to a forum that is empowered to provide a remedy. Unfortunately, Justice Powell's fears pale in contrast to the reality of the instant case. Justice Powell expressed concern that the General Counsel could take weeks to determine whether a complaint would be issued, a necessary step prior to the vesting of jurisdiction in the Board. *Sears*, 436 U.S., at 212-213. In the instant case, the General Counsel took 13 months to issue his complaint, Petition for Certiorari, at p. 5. During that time, no tribunal would be empowered to provide relief from unlawful picketing if state courts were denied jurisdiction.

In a situation where relief must be granted in the very short term if it is to be effective, a delay of more than a year is effectively a complete denial of access to the courts and, therefore, an infringement of the First Amendment right to petition government.

Such a result would be particularly anomalous in a situation where, as the Court recognized in *Sears*, 436 U.S., at 205, the conduct in question is almost certainly unprotected: "a trespass is far more likely to be unprotected than protected." This conclusion, of course, derives directly from *Babcock & Wilcox* and the cases that followed it.

In *Bill Johnson's Restaurants*, 461 U.S. at 741, the Court characterized the First Amendment right to petition government, along with the interest of a state in the maintenance of its domestic peace, as "weighty countervailing considerations," that militated against the denial of access to legal redress in a state court. Those same considerations are present in the instant case. However, the considerations in favor of removing jurisdiction are virtually non-existent. Rather, as Justice Powell demonstrated in his concurring opinion in Sears, the realities of modern labor activity demand that employers be allowed access to a forum that can provide necessary relief in a timely fashion. Also, *see*

International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 202 (1970) (White, J., concurring).[8]

III. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO FINALLY RESOLVE THE QUESTION OF PRE-EMPTION THAT WAS LEFT OPEN IN *SEARS*, WHICH HAS LED TO A SIGNIFICANT SPLIT OF OPINION IN THE STATE COURTS THAT HAVE ADDRESSED THE QUESTION. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THE MATTER IN ABEYANCE, PENDING THE RESOLUTION OF *LECHMERE v. NLRB*, No. 90-970, WHICH IS CURRENTLY PENDING BEFORE THE COURT

Ironically, the current uncertainty as to the applicability *vel non* of the pre-emption doctrine to trespassory informational picketing has resulted in a significant split among the states that have addressed the question. Thus, a doctrine that is intended to provide national uniformity in the application of labor policy has led to substantial uncertainty as to the rights of employers and a wide divergence in the rights they receive. This split, standing alone, would warrant issuance of this Court's Writ of Certiorari. When it is recognized that the result of the split,in those states that have incorrectly concluded that pre-emption is appropriate, is that employers are denied the basic right of access to a forum that can provide relief for tortious activity, the need for issuance of the Writ becomes compelling.

The Court may find it convenient to consolidate this case with *Lechmere, Inc. v. NLRB*, No. 90-970, which is currently pending before this Court. That case involves issues of the legality of Board policy of permitting non-employee union

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[8] "So long as employers are effectively denied determinations by the NLRB as to whether 'arguably protected' picketing is actually protected except when an employer is willing to threaten or use force to deal with picketing, I would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent, [Garmon] should be reconsidered." *Id.*

organizers to trespass on an employer's property. In the alternative, since *Lechmere* is fully briefed, the Court may wish to defer consideration of this petition until Lechmere is decided.

CONCLUSION

WHEREFORE, *amicus curiae* Center on National Labor Policy, Inc., respectfully requests that the petition for writ of *certiorari* should be granted to reverse the decision of the West Virginia Supreme Court of Appeals.

Respectfully submitted.

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